IN THE

Supreme Court of the United States

October Term, 1957

No. 31

INTERNATIONAL ASSOCIATION OF MACHINISTS, ET AL.,
Petitioners

v.

MARCOS GONZALES, *Respondent*

On Writ of Certiorari to the California District Court of Appeal

PETITION FOR REHEARING

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Petitioners pray that a rehearing be granted of the decision of May 26, 1958 affirming the judgment in the above-entitled proceeding.

We would not file this petition if we thought we could urge in its support only another look at considerations already advanced. But we believe that the majority opinion shows on its face significant evidence of critical misunderstandings. And so we file this petition in the faith that, if error is disclosed, it will be corrected.

1. The opinion concludes with a quotation from Isaacson, Labor Relations Law: Federal Versus State Jurisdiction, 42 A.B.A.J. 415, 483, referring to it as an

apt description of the "important distinction between the purposes of federal and state regulation":

> Although even these state court decisions may lead to possible conflict between the federal labor board and state courts they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states. A state court decision requiring restoration of membership requires consideration of and judgment upon matters wholly outside the scope of the National Labor Relations Board's determination with reference to employer discrimination after union ouster from membership. The state court proceedings deal with arbitrariness and misconduct vis-a-vis the individual union members and the union; the Board proceeding, looking principally to the nexus between union action and employer discrimination, examines the ouster from membership in entirely different terms.

It must have come as a shocking surprise to the author to learn that this quotation supported the conclusion reached by the Court. For the views expressed by the author are diametrically opposed to the Court's. Thus, in the paragraph immediately preceding the quotation, the author wrote:

> In *Real* v. *Curran* [285 App. Div. 552, 138 N.Y.S. 2d 809] and *Mahoney* v. *Sailors Union of Pacific* [45 Wn. 2d 453, 275 P. 2d 440, cert. denied, 349 U.S. 915], the Ninth Circuit decision was distinguished insofar as the union member in those cases also sought a restoration of union membership. In the *Real* v. *Curran* case, the court concluded that the NLRB was not empowered to restore the individual to union membership and that its powers concerning discrimination related solely to reemployment and back pay for the period of

unemployment resulting from the employer's discrimination brought about at the union's request.

It was to *Real* v. *Curran* and *Mahoney* v. *Sailors Union* that the author referred when he wrote that "even *these* state court decisions may lead to possible conflict between the federal labor board and state courts [but] they do not present potentialities of conflicts in kind or degree which require a hands off directive to the states." And these state court decisions hold, as petitioners contend, that the state's power ends with restoring the wrongfully expelled individual to union membership; it does not extend to compensating the employee for loss of earnings based upon denial of employment following expulsion. In the author's view, as in petitioners', respect for this line creates only such risks of conflict as may fairly be dismissed as "remote." But obliteration of the line, it is the author's and petitioners' view, does "present potentialities of conflicts in kind or degree which require a hands off directive to the states."

2. We are not concerned with the Isaacson quotation as infelicitous citation. We are concerned that the Court's mistaken reliance on it reflects a misapprehension basic to the whole of the Court's opinion.

When a state court determines that an individual has been wrongfully expelled and requires his restoration to union membership, neither the claim adjudicated nor the relief granted falls within the province of the National Labor Relations Board. When, in addition, the state court determines whether the individual has been denied employment because of his expulsion and compensates him for loss of earnings, the conduct

and the remedy both "belong . . . to the usual administrative routine' of the Board."[1] The line was clearly drawn in a colloquy between Senators Taft, Ball, and Pepper (93 Cong. Rec. 4274):

> Mr. Taft. * * * The union could refuse membership; but if the man were an employee of the company with which the union was dealing, the union could not demand that the company fire him. The union could refuse the man admission to the union, or expel him from the union; but if he were willing to enter the union and pay the same dues as other members of the union, he could not be fired from his job because the union refused to take him.
>
> * * * * * *
>
> Mr. Pepper. And the union can admit to membership anyone it wishes to admit, and decline to accept anyone it does not wish to accept.
>
> Mr. Ball. That is correct. But the union cannot, by declining membership for any other reason than nonpayment of dues, thereby deprive the individual concerned of the right to continue in his job. In other words, it cannot force the employer to discharge him.

Protection of employment from impairment because of union membership or the want of it is the very work of the Board. Indeed, the system of hiring found by the state court to exist in this case—referral and clearance for work from a union hiring hall based on membership—is the precise practice which was a significant target of Congress when it amended the Wagner Act to prohibit the closed shop and to permit

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[1] *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130.

discharge from employment pursuant to a valid union security agreement only for nonpayment of periodic dues and initiation fees. As Senator Taft explained (93 Cong Rec. 3836):

> * * * the bill does abolish the closed shop. Perhaps that is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. That has produced a situation, certainly on the ships going to Alaska, * * * where there is no discipline. A man may be discharged one day and may be hired the next day, either for the same ship or for another ship. Such an arrangement gives the union tremendous power over the employees; furthermore it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field. Under such circumstances there is no freedom of exchange in the labor market, but all labor opportunities are frozen.

The Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess., 6):

> It is clear that the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and

engine officers has created the greatest problems in connection with the safety of American vessels at sea.

While the statute abolished the union hiring hall practice in which dispatch or clearance for work is based on membership, the statute did not prohibit the operation of a union hiring hall upon a nondiscriminatory basis. And so an ever-recurring question before the Board is whether a union is administering its hiring function to prejudice nonmembers or to prefer members. Formulation of standards especially attuned to the resolution of this question, and application of these standards by an agency which brings an expert feel to the situation, is the function of the Board and the very reason for its creation. This is no better illustrated than by the Board's very recent enunciation of minimum standards which must be incorporated in an agreement if the operation of a union hiring hall is to be deemed nondiscriminatory (*Associated General Contractors of America*, 119 NLRB No. 126-A, 41 LRRM 1460, 1462, March 27, 1958):

> (1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
>
> (2) The employer retains the right to reject any job applicant referred by the union.
>
> (3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrange-

> ment, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

And debarment of an employee from access to a hiring hall based on his nonmembership is without more a wrong rectifiable by the Board (*ibid.*):

> As an old time member of the Union, and aware of the established hiring hall arrangement, Lewis, of course, went to the Union to apply for work. Had he gone directly to one of the Respondent Employers he would unquestionably have been rejected summarily and referred to the union hall for clearance, for that is precisely what the contract obligated each employer to do. It matters not, therefore, which of the two parties to the illegal contract he first approached. His unlawful exclusion from employment was a joint act by both Respondents.[12]

[12] As indicated above, even were the particular hiring agreement here involved a lawful one, the Respondent Employers, having delegated hiring authority to the Union, would be *in pari delicto* and equally responsible with the Union for any particularized discrimination, as happened to Lewis here, that the Union perpetrated.

In this case, therefore, the majority opinion is flatly wrong when it sees in the conduct which is the basis for the state court's indemnification for loss of earnings simply "an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board . . ." (sl. op. p. 4). A state court's compensation for loss of earnings does not flow from its finding of wrongful expulsion from membership. Wrongful expulsion does not establish loss of earnings. State compensation for loss of earnings depends upon *denial of employ-*

ment based on wrongful expulsion. But denial of employment based on nonmembership is the very point at which the Labor Board intervenes, not argumentatively, but in fulfillment of just that commission with which Congress has entrusted it. The precise duplication in the conduct to which both the state court and the Board look is demonstrated by the findings which are the state court's predicate for compensating for loss of earnings (R. 131-132): "The ordinary practice was for employers to telephone the union hall for men, and the union members would be dispatched to the work. Thereafter [following respondent's expulsion] he applied to the union for an assignment to a job as he had done prior thereto. He was refused dispatch by the union dispatcher. He testified he sought work directly from the employers, but without success. Although there was some testimony to the effect that the union might dispatch a non-member to a job if he had a letter from the employer requesting him, the dispatcher testified that plaintiff would not have been dispatched even if he had such letter."

The short of it is that, for both the state court and the Board, the conduct relevant to compensation for loss of earnings is not expulsion but denial of employment based on expulsion. The state court is empowered to reach the relevant conduct only after first finding a wrongful expulsion; the Labor Board begins with the relevant conduct, because the rightness or wrongness of the expulsion is an irrelevancy under the federal statute. But the conduct relevant to support indemnification for loss of earnings—denial of employment based on nonmembership—is the same for both the state court and the Labor Board. The two tribunals may or may not evaluate this same conduct differently; they

may or may not agree that any loss of employment took place; they may or may not concur that loss of employment is attributable to nonmembership rather than referable to permissible reasons. Conflict is as inherent as it was in *Plankinton Packing Co.* v. *Wisconsin Employment Relations Board*, 338 U.S. 953. There, this Court held that the Wisconsin Board was without power to order an employer to reinstate an employee to his job with back pay, for "the N.L.R.B. was given jurisdiction to enforce the rights of the employees. . ." *Amalgamated Association* v. *Wisconsin Employment Relations Board*, 340 U.S. 383, 390, n. 12, explaining *Plankinton*. Since the "potential conflict" in *Plankinton* was not "too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act" (sl. op. p. 5) to preclude the state agency from enforcing the state statute, it cannot be too contingent nor too remote to preclude a state court from enforcing its common law.

3. The Court's opinion, therefore, fails to meet the issue when it dwells upon expulsion from union membership, as if that were the relevant conduct, and does not consider denial of employment based on expulsion, which is the relevant conduct. It equally elides the the issue when, in evaluating the remedy available before the Board, it deprecatingly states (sl. op. p. 4): "Although if the unions' conduct constituted an unfair labor practice the Board *might possibly* have been empowered to award back pay, in no event could it mulct for damages for mental or physical suffering" (emphasis supplied).

A correct statement would be, not that the Board "might possibly have been empowered to award back pay," but that it is beyond peradventure certain it

would have awarded back pay. For neither the power nor its exercise is in any doubt. Under the Wagner Act, as against employers, the Board had and exercised the power to order "that workers who had been denied employment be made whole for their loss of pay" (*Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U.S. 177, 197), and the Taft-Hartley amendments in terms provided that "back pay may be required of the . . . labor organization . . . responsible for the discrimination suffered" by the employee, thus giving "the board power to remedy union unfair labor practices comparable to the power it possessed to remedy unfair practices by employers" (*Radio Officers' Union* v. *National Labor Relations Board,* 347 U.S. 17, 54). And the power to require back pay of a labor organization has been routinely exercised whenever the labor organization has been found responsible for discrimination in employment. In the 1957 fiscal year, 222 workers recovered back pay in the amount of $85,149 from unions,[2] and in the six fiscal years from 1951 through 1957, 4,224 workers recovered back pay in the amount of $400,479 from unions.[3] It is thus simply incorrect to describe the Board's back pay remedy against unions for discrimination in employment for which they are responsible as a power which "might possibly" exist.

True it is that the Board's back pay remedy is exercised to "effectuate the policies of the Act." Section 10(c). But the "policy of the Act is to make whole

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[2] N.L.R.B., 22nd Annual Report, 164 (1957).

[3] The 16th through the 22nd annual reports of the Labor Board at respectively pp. 295, 282, 96, 158, 162, 166, 164.

nployees . . . discriminated against.". *Radio Officers' nion* v. *National Labor Relations Board*, 347 U.S. 7, 55. There are relatively infrequent cases where, ough an employee has been discriminated against, einstatement and back pay are withheld because the nployee has also engaged in such serious miscon- uct as to make the grant of relief inconsistent with ffectuation of the policies of the Act. *National Labor elations Board* v. *Local Union No. 1229, Interna- onal Brotherhood of Electrical Workers*, 346 U.S. 64, 478, n. 13. Were a state court to compensate an nployee for loss of earnings, in circumstances where he Labor Board would withhold back pay because s grant is incompatible with the Act's policies, it ould constitute precisely the "conflict in the ad- inistration of remedies for the practices proscribed y § 8" which preemption is designed to avoid. *Algoma lywood & Veneer Co.* v. *Wisconsin Employment Re- tions Board*, 336 U.S. 301, 306. To withhold back ay because its award is inconsistent with effectuation f the Act's policies is to withhold it because its grant incompatible with the national labor policy. For a ate court to render the money judgment equivalent f back pay, when the Labor Board would not, is for he state to flout the national labor policy.

This leaves for consideration the Board's lack of ower to "mulct for damages for mental or physical uffering" (sl. op. p. 4). Here again the Court's opin- n fails to make a differentiation critical to sound valuation. Petitioners do not contest the power of he state court to assess damages for mental or physical uffering attributable to wrongful expulsion; they do ontest the power of the state court to assess damages or mental or physical suffering attributable to denial

of employment based on expulsion. For to award damages for mental or physical suffering due to discrimination in employment is to exact reparations in excess of that which Congress has determined suffices for the correction of the wrong. And the vice in this case is that the state court awarded damages for mental distress based, not upon wrongful expulsion, but on discrimination in employment. As we stated in our opening brief (p. 15, n. 8): "It seems clear that the state court's award of $2,500 damages for mental distress was based upon the distress found to be caused by respondent's discriminatory loss of employment and not for other reasons outside the purview of the National Labor Relations Act. Thus, the District Court of Appeal in its first opinion, when it held that the state court was without power to award damages for discriminatory loss of employment, vacated the whole of the money judgment and did not attempt to allocate any part of it to causes other than loss of employment (*infra*, pp. 2a-3a). And the evidence at the trial shows that the distress claimed by respondent related to his loss of employment (R. 101-103). In any event, assuming *arguendo* that the money judgment for mental distress is allocable partially to reasons other than loss of employment, a remand to the state court is necessary, for it entered a 'unitary judgment . . . based on the erroneous premise that it had power to reach the Union's conduct in its entirety.' *Amalgamated Meat Cutters* v. *Fairlawn Meats*, 353 U.S. 20, 24-25."

4. The justification advanced in favor of the Court's conclusion reduces to the assertion that the state has an unquestioned hold of a substantial part of the controversy by virtue of its power to adjudicate the va-

idity of expulsion from membership. But this states he problem, not its solution. It no more justifies the state's engulfment of the whole of the controversy han would the Labor Board's indubitable hold upon he discrimination in employment aspect of the dispute justify total ouster of the state. It is not an either-or proposition. An harmonious adjustment of the federal-state relations which mutilates neither the federal scheme nor the state system requires simple recognition that the area of federal competence is not within he state's domain.

This was indeed the adjustment effect by this Court n *Youngdahl* v. *Rainfair, Inc.*, 355 U.S. 131. There, he state court's undoubted power to enjoin violent conduct did not extend to regulation of peaceful picketing, although the controversy in its entirety embraced single situation. Said the Court (*id.* at 139):

> Though the state court was within its discretionary power in enjoining future acts of violence, intimidation and threats of violence by the strikers and the union, *yet it is equally clear that such court entered the preempted domain of the National Labor Relations Board insofar as it enjoined peaceful picketing by petitioners.* The picketing proper, as contrasted with the activities around the headquarters, was peaceful. There was little, if any, conduct designed to exclude those who desired to return to work. Nor can we say that a pattern of violence was established which would inevitably reappear in the event picketing were later resumed. Cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287. What violence there was was scattered in time and much of it was unconnected with the

> picketing. There is nothing in the record to indicate that an injunction against such conduct would be ineffective if picketing were resumed. (Emphasis supplied.)

We discern no difference between this case and *Rainfair*, except that in *Rainfair* the state court "entered the preempted domain" to enjoin conduct protected by the federal act, and here the state court awarded compensation for conduct prohibited by the federal act. But the domain is equally preempted whether the conduct is "prohibited by the federal Act" or "within the protection afforded by that Act. . . ." *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 481.

5. Until this case, except for the ambiguous area of violent conduct, it was datum that if the subject was within the jurisdiction of the Labor Board it was not within the power of the state court. This case, together with the Court's declination on June 2, 1958 to review *Teamsters Union, Local 174* v. *Selles*, No. 649, October Term, 1957, a declination which it is fairly inferable is based on the outcome here, has thrown the field into bewilderment. For *Selles* cannot rest on this case, and if nevertheless the Court conceives that "litigating elucidation" is not necessary to explain *Selles*, then the guideposts are no longer discernible.

Selles cannot rest on this case, for the essential predicate of state court jurisdiction in this case—power to adjudicate the validity of expulsion from membership—is absent in *Selles*. The state court found, as the record in *Selles* shows (St. 136), that "Selles was, and still is, a member of Local 174" (314 P.2d 456, 457). Furthermore, Selles recovered dam-

ages solely for his loss of earnings (Trial Court's instructions No. 1 and 9, St. 447, 454-455), not for any mental or physical suffering, and not augmented by punitive damages. The money judgment was therefore the equivalent of a back pay award. And the conduct which was the basis of the recovery—which the state court adjudicated under the rubric of a common law tort of interference with employment—was forthrightly recognized by the state court to constitute "an unfair labor practice under the Act" (314 P.2d at 459).

Thus, Selles incurred the displeasure of the union's officialdom by organizing a meeting looking towards a change in the union's leaders and policies (314 P.2d at 457-458). In retaliation for this activity—conduct found by the state court to be "for mutual aid or protection" (314 P.2d at 458)—the union refused to dispatch Selles for work from the hiring hall—conduct found by the state court to constitute "discrimination in regard to hire" (*ibid.*). The union controlled employment in Selles' field of work, and without the approval of its officials no work could be obtained (*ibid.*). As a result, Selles was without work for over a year, except for two short periods of time, and was ultimately compelled to leave the industry and find less remunerative work in another field (314 P.2d at 457).

Selles filed a charge with the Labor Board, alleging these facts; the Board issued a complaint (314 P.2d at 457). But before a hearing could be had, Selles withdrew his charge and instituted the state court action in place of the Labor Board proceeding (*ibid.*). The state court concluded that the "facts reasonably bring the controversy within the purview of the Act" (314 P.2d at 458). And it stated that the question presented, which it answered no, was (314 P.2d at 459):

Does the National Labor Relations Board hav exclusive jurisdiction over matters involving con duct which constitutes an unfair labor practic under the Act, so as to preclude a state court fro hearing and determining a common law tort actio for damages resulting from interference with em ployment based on such conduct?

If the instant case answers this question no, then i stands for much more than the opinion discloses, an rehearing is required on this score alone. If the in stant case does not answer this question, an answer i required if we are to have any idea of the metes an bounds of federal authority and state power. *Selle* is as appropriate a vehicle for "litigating elucidation as any, and certiorari should be granted in conjunctio with a rehearing of this case.[4]

WHEREFORE, this petition for rehearing should b granted.

Respectfully submitted,

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[4] We are informed that a petition for rehearing of the denial o certiorari is to be filed in *Selles*.

CERTIFICATE OF COUNSEL

I certify that this petition is filed in good faith and not for purposes of delay.

BERNARD DUNAU
Attorney for Petitioners.

June, 1958.